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Feb. 17 Continued to Saturday next
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SUPREME COURT OF THE UNITED STATES.

No. 309.

THE UNITED STATES, PLAINTIFFS,

vs.

GEORGE Y. SCOTT.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

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ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES O THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT O INDIANA.

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1 UNITED STATES OF AMERICA,
District of Indiana, ss:

At a circuit court of the United States begun and held at Indianapolis for the district of Indiana on Tuesday, the seventh day of November, A. D. 1865, and continued till the 30th day of the same month in the same year—

Present: Hon. David Davis, associate justice of the Supreme Court of the United States, and Hon. David McDonald, judge of the district court of the United States for the district of Indiana.

THE UNITED STATES
vs.
GEORGE Y. SCOTT. } Indictment for murder.

Be it remembered, that heretofore, to wit: At the May term, 1865, of said circuit court, to wit, on the 19th day of May, 1865, at the same place and before the same judges aforesaid, the grand jurors of that court and term, having been duly empannelled and sworn, brought into that court, before the same judges, an indictment against said George Y. Scott for murder, duly signed by their foreman as a true bill, in the words and figures following:

In the circuit court of the United States for the eighth circuit and district
2 of Indiana, May term, in the year of our Lord one thousand eight hundred and sixty-five.

UNITED STATES OF AMERICA,
District of Indiana:

The grand jurors of the United States of America within and for the eighth circuit and district of Indiana, empannelled, sworn, and charged at the May term of the circuit court of the United States of America within and for the district of Indiana, in the year of our Lord one thousand eight hundred and sixty-five, to inquire for the United States of America within and for the body of the district aforesaid, upon their oath present: That on the third day of October, in the year of our Lord one thousand eight hundred and sixty-four, at and in the district aforesaid and within the jurisdiction of this court, George Y. Scott, late of the county of Daviess, in said circuit and district, with force and arms unlawfully and feloniously did then and there assault, hinder, obstruct, and impede one Eli McCarty, while he, the said Eli McCarty, was then and there employed in the performance of his legal service in relation to the enrolment of the national forces, he, the said Eli McCarty, being then and there a person duly
authorized, empowered, employed, and directed by Blythe Hynes, he,
3 the said Blythe Hynes, being then and there the provost marshal of the first congressional district of the State of Indiana, to wit, at and in the circuit and district aforesaid, to notify and serve with notice the enrolled and drafted men of Harrison and Reeves townships, in the county of Daviess, in the State of Indiana, to wit, at and in the circuit and district aforesaid, requiring them as such enrolled and drafted men to appear at the designated rendezvous in said congressional district, to report for military duty; and the said service, in the performance of which he, the said Eli McCarty, was then and there employed as aforesaid, being then and there in relation to the enrolment of the national forces, duly ordered by the proper and legally constituted authorities, in pursuance and by virtue of a law of the United States entitled "An act for enrolling and calling out the national forces and for other purposes," approved March the third, in the year of our Lord one thousand eight hundred and sixty-three, and also a law of the said United States entitled "An act to amend an act
entitled 'An act for enrolling and calling out the national forces, and for
4 other purposes,' approved March third, eighteen hundred and sixty-three,"

which said law was approved February twenty-fourth, eighteen hundred and sixty-four, and also a law of the said United States entitled "An act further to regulate and provide for the enrolling and *and* calling out of the national forces, and for other purposes," approved July the 4th, eighteen hundred and sixty-four, he, the said George Y. Scott, then and there well knowing the premises; and the jurors aforesaid, upon their oaths aforesaid, do say that he, the said George Y. Scott, on the day and year aforesaid, at and in the circuit and district aforesaid, with force and arms unlawfully and feloniously did then and there, in and upon the body of him, the said Eli McCarty, while he, the said Eli McCarty, was employed as aforesaid in the performance of said service, to wit, in notifying and serving with notice the enrolled and drafted men of Harrison and Reeves townships, in the said county of Daviess, in the State of Indiana, to wit, at and in the circuit and district aforesaid, as by the said provost marshal he was authorized, empowered, employed, and directed to do as aforesaid,
5 the said service then and there relating to the enrolment of the national forces as aforesaid, feloniously, unlawfully, and of his malice aforethought, make an assault, and that the said George Y. Scott, a certain pistol of the value of ten dollars, then and there charged with gunpowder and one leaden bullet, which said pistol he, the said George Y. Scott, in his right hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said Eli McCarty; and that the said George Y. Scott, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said George Y. Scott discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound him, the said Eli McCarty, in and upon the right side of the body of him, the said Eli McCarty, giving to him, the said Eli McCarty, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot off out of the pistol aforesaid, by the said George Y. Scott, in and upon the right side of the body of him, the said Eli McCarty, a mortal wound of the depth of
6 six inches and of the bredth of half an inch, of which said mortal wound he, the said Eli McCarty, then and there instantly died.

And the jurors aforesaid, upon their oaths aforesaid, do say that the said George Y. Scott him, the said Eli McCarty, while he, the said Eli McCarty, was then and there in the performance of service relating to the enrolment as aforesaid, in manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said assaulting of him, the said Eli McCarty, while in the performance of his said service in relation to the enrolment of the national forces, to wit, while engaged and employed in notifying and serving with notice the enrolled and drafted men of Harrison and Reeves townships, in the said county of Daviess, in the State of Indiana, to wit, at and in the circuit and district aforesaid, as by the said provost marshal of the first congressional district of the State of Indiana he was authorized, em-
7 powered, employed, and directed to do, as aforesaid, by him, the said George Y. Scott, then and there, to wit, at and in the circuit and district aforesaid, produced the death of him, the said Eli McCarty, contrary to the act of Congress in such case made and provided, and against the peace and dignity of the United States of America.

JOHN HANNA, *U. S. Att'y.*

A true bill. JAMES H. CRAVENS, *Foreman.*

8 And afterwards, at the same May term of said court, the said George Y. Scott in proper person pleaded not guilty to said indictment, and thereupon, then and there in the same court, a jury was duly empannelled and

sworn to try the issue joined on said plea, who, after hearing the evidence, upon their oath, did then and there say that the defendant George Y. Scott was and is guilty in name and form as charged in said indictment; whereupon before the same court and judges, at the same term last aforesaid, to wit, on the 6th day of June, 1865, the said George Y. Scott, by his counsel, moved the said court to arrest the judgment on the verdict as found by the jury as aforesaid, on the ground that upon the face of said indictment it appears that Eli McCarty named therein was, at the time when he was killed, not "employed in making or in aiding to make any enrollment under the act of Congress of February 24th, 1864, entitled 'An act to amend an act entitled An act for enrolling and calling out the national forces and for other purposes,' approved March third, eighteen hundred and sixty-three," and that by said indictment it does not appear that said Eli McCarty, at the time when he was killed, was em-

9 ployed in the performance or aiding in the performance of any service in any way relating to such enrolment as aforesaid.

And the said judges, not being sufficiently advised touching said motion, held the same over under advisement until the term of said court first aforesaid.

And at the term first aforesaid, to wit, the November term, 1865, of said court, the said motion in arrest of judgment again coming up for discussion and consideration, it occured as a question whether the services of said Eli McCarty, as stated in said indictment, in notifying "enrolled and drafted men of Harrison and Reeves townships, in the county of Daviess, in the State of Indiana," to appear at the designated rendezvous "and report for military duty," taken and considered in connexion with the other averments in said indictment, did or would constitute any employment in the performance or in aiding in the performance of any service in any way relating to the enrolment mentioned in said act of February 24, 1864, according to the true intent and meaning of the twelfth section of that act.

On which question the opinion of the judges aforesaid were opposed.

10 Whereupon, on motion of the district attorney of the district aforesaid, that the disagreement aforesaid on the question aforesaid be certified to the Supreme Court of the United States to be finally decided—

It is ordered, that the aforesaid question, together with a copy of said indictment as above set forth, and a complete transcript of all the matters above stated, be duly certified to said Supreme Court, in order that said Supreme Court may finally decide the question aforesaid, on which the opposition of opinion hath arisen in manner and form aforesaid.

And the clerk is directed to furnish to the attorney prosecuting the pleas of the United States in this behalf a copy of the record in this cause.

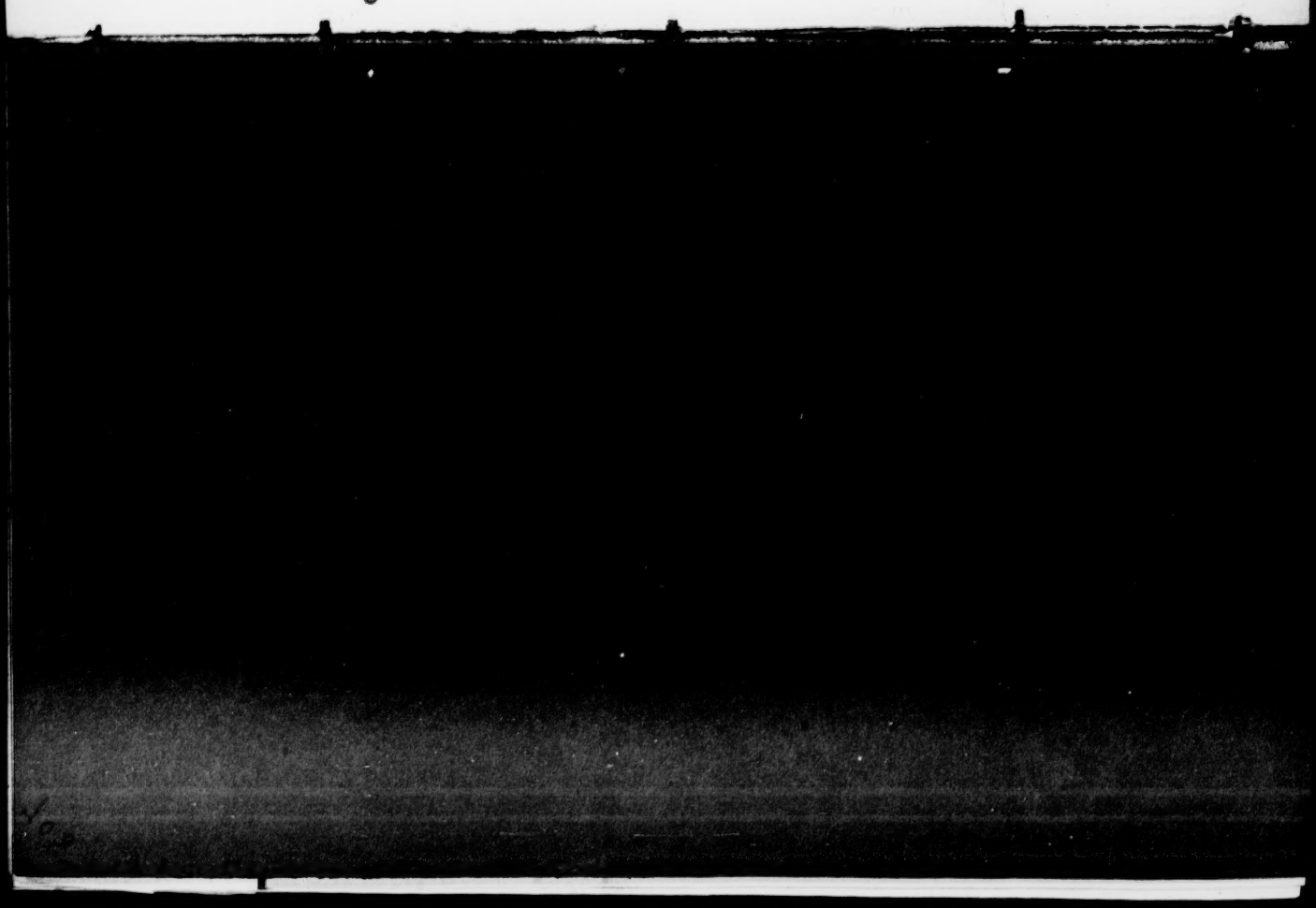
And said George Y. Scott is remanded to the custody of the marshal.

11 UNITED STATES OF AMERICA,
District of Indiana, ss:

I, John D. Howland, clerk of the United States circuit court in and for the district aforesaid, do hereby certify that the above and foregoing is a full and complete copy of the record in said court of the case upon opposition of opinion made by the judges thereof, upon the motion in arrest of judgment, in The United States *v.* George Y. Scott, on indictment pending in said court.

In testimony whereof, I do hereunto set my hand and the seal of said court, at Indianapolis, this 20th day of November, 1865.

[SEAL.] J. D. HOWLAND, *Clerk.*



Supreme Court of the United States.

THE UNITED STATES

vs.

GEORGE Y. SCOTT.

BRIEF ON BEHALF OF SCOTT.

George Y. Scott was indicted in the circuit court of the United States for the district of Indiana for the murder of Eli McCarty. The indictment was founded upon the 12th section of "An act approved February 24, 1864, to amend an act approved March 3, 1863, for enrolling and calling out the national forces, and for other purposes."

After the conviction of Scott a motion was made in arrest of judgment, on the ground that the indictment did not charge any offence of which the courts of the United States could take jurisdiction; upon the question made, the opinions of the judges were opposed, and thereupon they directed it to be certified to this Court.

The 25th section of the act of March 3, 1863, provides: "That if any person shall resist any draft of men *enrolled* under this act into service of the United States, or shall counsel or aid any person to resist any such draft, or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto, or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted man not to appear at the place of rendezvous, or willfully dissuade them from the performance of military duty, as required by law, &c., upon conviction thereof, shall be punished by a fine not exceeding five

hundred dollars, or imprisonment not exceeding two years, or both of said punishments." (Stat. at Large, vol. 12, p. 735.)

The 12th section of the amendatory act, upon which this indictment was founded, reads as follows: "That any person who shall forcibly resist or oppose any *enrollment*, or shall incite, counsel, encourage, or who shall conspire or confederate with any other person or persons, forcibly to resist or oppose any such *enrollment*, or who shall aid or assist, or take any part in any forcible resistance or opposition thereto, or who shall assault, obstruct, impede, or threaten any officer or other person employed in making or aiding to make any such enrollment, or employed in the performance, or aiding in the performance, of any service in any way relating thereto, &c., shall, upon conviction thereof in any court competent to try the offence, be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding five years, or both of said punishments, in the discretion of the court. And in cases where *such* assaulting, obstructing, hindering, or impeding shall produce the death of such officer or other person, the offender shall be deemed guilty of murder, and upon conviction, &c., shall be punished with death," &c. (Acts of 1864, p. 8.)

The amendatory act repeals only so much of the former act as may be inconsistent with it. (Sec. 27, p. 11.)

It will be seen that section 25 of the original act punishes the resistance to any *draft* of men enrolled under the act into the service of the United States, or in assaulting any officer in making such *draft*, or in the performance of any service relating to the draft; while the 12th section of the amendatory act provides for the punishment of any person who shall forcibly resist the *enrollment*, or assault, or obstruct any officer or other person in making such enrollment, or in the performance of any service in any way relating to the the enrollment; there is, therefore, nothing in section 25 of the original act inconsistent with section 12 of the amendatory act, and both sections may be considered as parts of the same law, to be enforced, each in the particular class of cases defined in the respective sections.

At the time the original act was passed it did not seem that any difficulty was anticipated in making the enrollment itself, and, therefore, the penalties of that act were directed against resistance to the draft after the enrollment had been made; for the language is, "any draft of men enrolled under this act." And any higher offence that might

result from such resistance was left to be dealt with by the laws of the State in which it might occur.

The amendatory act passed at the next session of Congress provides for the omitted case, and guards against any resistance to the enrollment or the performance of any duty in any way relating to the enrollment. Under the act of 1863 the extent of the punishment which might be inflicted for resistance to the draft is five hundred dollars fine and two years' imprisonment. Under the amendatory act the extent of the punishment for resisting or obstructing the enrollment is five thousand dollars fine and five years' imprisonment. It also provides that where "*such*" resistance shall produce death, (that is, such as is denounced by that act as unlawful,) "the offender shall be deemed guilty of murder." Now, it cannot be claimed that the terms "draft" and "enrollment" are convertible terms, or that the one is embraced in the other, or that a service relating to one is a service relating to the other; for, in addition to the fact that such is not the ordinary meaning of the terms, the acts of Congress under consideration clearly make a distinction. In the first act it speaks of resistance to a draft of men enrolled, while in the amendatory act draft is not mentioned; it being there taken for granted that the original act has sufficiently guarded that; while the act of enrollment, having been wholly omitted in the first, is fully protected in the amendment. Again, the two acts provide for different degrees of punishment for the different classes of offences defined by them. If resistance in either class of cases should result in the death of the officer or other person engaged in the execution of the law, it would be murder; but, in the class of cases named in the original act, the State and not the Federal courts would have cognizance of that offence, and it is only in those cases provided for in the amendatory act that the extraordinary jurisdiction is confined upon the Federal courts to try the crime of murder committed within the jurisdiction of a State.

The indictment in this case charges that George Y. Scott assaulted and killed Eli McCarty while he, the said McCarty, "was employed in the performance of a service in relation to the enrollment, to wit: while engaged and employed in notifying and serving with notice the enrolled and drafted men of Harrison and Reeve townships in said county of Daviess and State of Indiana, requiring them, as such enrolled and drafted men, to appear at the designated rendezvous, in said congressional district, to report for military duty." The

particular act in which McCarty was engaged at the time he was killed being set out in the indictment, it is for this Court to say, under the rules for construing penal statutes, whether that act falls under the one or the other of the sections above quoted. It is averred in the indictment that it was a service relating to the enrollment, but if this Court should be of opinion that it was "the performance of a service relating to the draft," then the motion in arrest of judgment should have been sustained. It seems quite clear to us that this must be the construction (to) be placed upon the act by the Court. McCarty was engaged in notifying *enrolled* and *drafted* men of Reeve and Harrison townships to appear at the place of rendezvous; this presupposes not only a completed enrollment, but a draft in pursuance of it, and the work in which he was engaged had direct relation to the draft, and necessarily followed it; and the Court cannot pass over the important act of the draft from which the duties of McCarty directly resulted, and without which he would have had no power to act, and attach the service he was engaged in the performance of to the antecedent act of enrollment. To make this construction of the law more obvious, suppose Scott had only resisted and obstructed McCarty in the performance of this particular duty, under which of the sections of law above quoted would his offence have fallen? Most clearly the 25th section of the act of 1863, for assaulting and obstructing an officer in "the performance of a service relating to the draft," and the Court would have been limited to the maximum of punishment provided in that section. If this would have been true in the case of mere resistance to the officer in the act of serving notice on drafted men; it must be equally true in regard to the higher crime of murder, for, as we have seen, the 12th section of the amendatory act embraces only *such* resistance as that section provides for, and not such as may be embraced in the 25th section of the original act. If the act of 1864 stood alone, it would be a strained construction to say that the act of notifying him, who had been already enrolled and drafted, was a service in any way relating to the enrollment; but, taken as an amendment to the act of 1863, we do not see how the broad construction which was given to it in this indictment can be maintained.

We do not insist on the very strict rule of construction which was indulged in by the courts at the time when the death penalty was affixed to so many crimes now regarded as of lesser note; but we have been asking only for the ap-

lication of such rules as have governed this Court in similar cases. And especially we ask attention to the rulings of this Court, in the case of The United States *vs.* Wiltberger, 5th Wheat., page 76.

It will be seen, by a reference to that case, that while the rule that statutes must be construed according to the intention of the legislature is regarded as applicable to penal statutes as well as others, yet this is no independent rule that can be made to subvert the ancient rule requiring a strict construction; and that the legislative intention must be manifest in the language employed; that courts cannot supply the omission. This Court may not be able to see why Congress has given jurisdiction to the Federal courts to punish murder committed, in resisting one law and not another, or in resisting one act of its officers and not another; but, to quote the language of the Chief Justice in the case above referred to: "Congress has not made it punishable, and this Court cannot enlarge the statute."

J. E. McDONALD,
A. L. ROACHE,
WM. E. NIBLACK,
Attorneys for Scott.

In the Supreme Court of the United States.

DECEMBER TERM, 1865.

UNITED STATES
vs.
GEORGE Y. SCOTT. } No. 309.

ARGUMENT FOR THE UNITED STATES.

JAMES SPEED,
Attorney General.
TITIAN J. COFFEY,
Special Counsel for United States.

In the Supreme Court of the United States.

DECEMBER TERM, 1865.

UNITED STATES
vs.
GEORGE Y. SCOTT.

ARGUMENT FOR THE UNITED STATES.

The judges of the circuit court were opposed in opinion upon the question whether the services of Eli McCarty, as stated in the indictment, in notifying "enrolled and drafted men of Harrison and Reeves townships, in the county of Daviess, in the State of Indiana, to appear at the designated rendezvous," and report for military duty, taken and considered in connexion with the other averments in said indictment, did or would constitute any employment in the performance, or in the aiding of the performance, of any service in any way relating to the enrolment mentioned in the 12th section of the act of 24th February, 1864.

The act entitled "An act for enrolling and calling out the national forces, and for other purposes," approved March 3, 1863, (12 Stat., 731,) creates boards of enrolment and prescribes their duties.

By section 8, each board must be composed of the provost marshal of the district and two other persons, one of whom must be a licensed and practicing physician and surgeon.

The 9th section requires the board to appoint one enrolling officer, whose duty it shall be to enrol all persons of his district subject to military duty, and report the same to the board of enrolment.

By the 12th section it is made the duty of the enrolling

board to make a draft of the required number, and a complete roll of the names of the persons so drawn, and the persons so drawn shall be notified of the same within ten days thereof by a written or printed notice, to be served personally or by leaving a copy at the last place of residence, requiring them to appear at a designated rendezvous to report for duty.

The 13th section authorizes any person drafted and notified to furnish an acceptable substitute, or pay three hundred dollars.

The 14th section requires that all persons who have been drafted and notified, on arriving at the rendezvous, shall be carefully inspected by the surgeon of the board, who shall report to the board the physical condition of each one; and that all persons drafted and claiming exemption from military duty, on account of disability or any other cause, shall present their names to be exempted, to the board, whose decision shall be final.

The 16th section authorizes the board to discharge any excess of numbers, and provides that the expenses connected with the enrolment and draft, including subsistence while at the rendezvous, shall be paid from the appropriation for enrolling and drafting, under such regulations as the President of the United States shall prescribe.

From these provisions it is manifest that after the organization of the board its duties commence with the appointing of an enrolling officer, who furnishes a roll to the board, upon which a draft is made. After the draft, the board notify the persons drafted of the time and place at which they must appear, either for the purpose of showing their disability, furnishing a substitute, or being organized and placed into active service. The enrolment is not perfect until the board have, at the place of rendezvous, made all the necessary and proper inspections, and furnished all the necessary and proper discharges for inability, and descriptive lists. Of course, everything done between the first enrolment and the final duty of mustering the men into active service is part and parcel of the

service of enrolment, and each and every person lawfully engaged in that duty, and each part of that duty, must be regarded as an officer or person employed in making, or in aiding to make, such enrolment, or employed in the performance, or aiding in the performance, of service in relation thereto.

It is enacted by the 25th section of the act of March 3, 1863, "that if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft; or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto; or shall counsel any person to assault or obstruct any such officer; or shall counsel any drafted men not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost marshal, and shall be forthwith delivered to the civil authorities, and, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments."

It can hardly be contended that, under this section, any person who should knowingly interfere with and obstruct an officer giving notice of a draft would not be punishable.

The word *draft* in this section embraces everything that it was the duty of the enrolling board and officers under them to do, in order to place the men in a position for active service. The word *draft*, as used in this section, is evidently the synonym of the word *enrolment*, as previously described in the sections of the act before referred to.

Then by the twelfth section of the act entitled "An act to amend an act for enrolling and calling out the national forces, and for other purposes," approved February 24, 1864, (Laws 1863–64, p. 8,) it is enacted "that if any person shall forcibly resist or oppose any enrolment, or shall incite, counsel, encourage, or shall conspire or confederate with any other

person or persons forcibly to resist or oppose any such enrolment, or who shall aid or assist, or take any part in any forcible resistance or opposition thereto, or shall assault, obstruct, hinder, impede, or threaten any officer, or other person employed in making or in aiding to make such enrolment, or employed in the performance or in aiding in the performance of any service in any way relating thereto, or in arresting or aiding to arrest any spy or deserter from the military service of the United States, he shall, upon conviction thereof, in any court competent to try the offence, be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding five years, or by both of said punishments, in the discretion of the court. And in cases where such assaulting, obstructing, hindering, or impeding shall produce the death of such officer or other person, the offender shall be deemed guilty of murder, and, upon conviction thereof upon indictment in the circuit court of the United States for the district within which the offence was committed, shall be punished with death."

Now, the word *enrolment*, as used in this section, embraces the thing or things which the act of March 3, 1863, assigned and required to be done by the board of enrolment. Each officer of that board, and all the legally appointed employés of the board, are under the protection of the section whenever and wherever they are performing the duties assigned them by the act.

The indictment in this case alleges that George Y. Scott did knowingly hinder, obstruct, and impede one Eli McCarty while he, the said Eli McCarty, was then and there employed in the performance of his legal service in relation to the enrolment of the national forces, he, the said Eli McCarty, being then and there a person duly authorized, empowered, employed, and directed by Blythe Hynes—he, the said Blythe Hynes, being then and there the provost marshal of the first congressional district of Indiana—to notify and serve with notice the enrolled and drafted men of Harrison and Reeves

townships, in the county of Daviess; and the service in the performance of which he, the said Eli McCarty, was then and there employed as aforesaid, being then and there in relation to the enrolment of the national forces, duly ordered by the proper and legally constituted authorities of the United States.

It will be perceived that this allegation in the indictment is almost directly within the language, and certainly within the meaning, of the twelfth section of the act of February 24, 1864, and I cannot perceive any other portion of the indictment which is either in conflict with or in any way explanatory of the allegation thus directly made.

This legislation increases the penalty without changing the offence.

The word "draft," as used in the 25th section of the act of 1863, does not simply mean the act of drawing the lottery by which it is determined who is to go into the active service, but means and includes all the services which the board have to perform in order to place men in the active service.

So the word "enrolment," as used in the 12th section of the act of February 24, 1864, means the same thing.

The man who was serving notices of the draft was as much and as certainly engaged in perfecting the enrolment as the enrolling officer. Neither the enrolment nor the draft is complete until the board have passed upon the drafted men at the place of rendezvous.

The word enrolment, as used in this section, means as well the final roll for active service as the first roll for a draft.

The purpose of the section was to afford protection to the enrolling officers in performing their whole duty; as well when making the last as the first roll.

JAMES SPEED,
Attorney General.